No. 3427

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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PABST BREWING COMPANY,
a Corporation,
Plaintiff in Error

vs

E. CLEMENS HORST COMPANY,
a Corporation,
Defendant in Error.

Answer to Appellant's Petition for Rehearing

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ANDERSON PRINTING CO. SACRAMENTO. CALIF

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ANSWER TO APPELLANT'S PETITION FOR REHEARING.

We have been served with a copy of appellant's petition for rehearing, in which the appellant reiterates its previous arguments that have already received the attention of the court. No answer is necessary in our opinion, as nothing new is presented, but we submit the following reply.

I.

Any objection that might be made to evidence is waived unless it is objected to and an exception taken.

Where no objection was offered, exception taken, or motion made to strike out, it cannot be urged

upon appeal that certain evidence was inadmissible because hearsay.

Central R. Co. of N. J. v. *Sharkey,* 259 Fed. 144.

The Supreme Court of the United States has held that statements of a witness, although based upon hearsay, constitute evidence in a cause unless reasonably objected to as hearsay.

Schlemmer v. *Buffalo etc. R. R. Co.* 205 U. S. 151 L. Ed. 681.

II.

Plaintiff in error does not attempt to attack that part of the opinion which holds that no finding of fact is reviewable for failure of plaintiff in error to request findings or to request a ruling or to take any exception.

III.

Both sides below tried the case upon the theory that the measure of damages was the difference between the market price at Milwaukee, on or about November 4, 1912 (the date of the breach) and the contract price. The plaintiff in error took a wide range without objection from us. It showed that the Milwaukee price was the same as the Chicago price, and the price at other Eastern points, and that the Eastern price or Milwaukee price was the same as the California price plus the freight from California to the East.

Thus a witness for the plaintiff in error showed

that the market for hops at Milwaukee is the same as at Chicago. "There is no difference in the sale price of Pacific Coast hops in Milwaukee from Chicago". (R. p. 193).

Another witness for plaintiff in error (John M. Spicer) testified that he was familiar with the price of choice Consumnes hops in the *Sacramento market* on November 4, 1912, or thereabouts. "I bought three lots of hops at that time at 18 cents." (R. p. 184).

Another witness (Otto Koch) for plaintiff in error testified as to the prices in the Sacramento market. He dealt in hops in the Sacramento section. (R. p. 183).

The plaintiff in error called P. C. Drescher to prove the Milwaukee price, and asked him if he was familiar with the Milwaukee price. He said he was not. It then proved by him that the market in Milwaukee was the same as at Sacramento, plus the freight and had the witness take the Sacramento price and add the freight price to obtain the Milwaukee price. (R. p. 229).

Another witness called for plaintiff in error (M. D. Wormser) testified that the Chicago market for hops of the character of the Consumnes hops is the same as the Milwaukee market (R. p. 188). And again "We did not sell hops in Milwaukee in November 1912 or the next month or two thereafter. We very seldom make Milwaukee, but I am familiar with the prices at Milwaukee because the prices are the same in Milwaukee *as in any other city, be-*

cause the feight rates are the same. We sold hops in other cities at that time but we made Milwaukee very little." (R. p. 188).

Another witness for plaintiff in error (G. G. Schumacher) testified: "There is no difference in the market price of hops in Chicago and Milwaukee." (R. p. 203).

He also testified that he "based the price of choice Consumnes hops on the price of choice Oregon and choice Sonomas. We always figure that the Consumnes are worth about a cent less than these qualities." (R. p. 204).

IV.

Defendant in error called witnesses who testified as to the market price in Milwaukee. No objection was made to this evidence. It is entirely sufficient. But even if it were entirely eliminated the finding of the court is sustained by.

(a) Actual sales at prices that averaged 15.7 cents per pound. This testimony was brought out by the plaintiff in error. (R. p. 67-70).

(b) By comparison with the sale of Oregon hops as shown without contradiction. (R. p. 108).

These points were fully argued in our prior briefs.

V.

As to the quantity of hops this fact was established by the evidence of E. Clemens Horst and also Ernest Lange. (R. p. 79-80).

No attempt is made to criticise the testimony of Lange which is more than sufficient to sustain the finding.

We recognize the futility of arguing before this court questions upon which witnesses differed in the court below, but submit the foregoing with the remark that all points have been fully argued in the briefs on file.

Respectfully submitted,
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